Even if the plaintiff could not recover upon the express contract, as it is now held that he can, he would yet have a good cause of action on the second count, for work and labor. His contention under this head seems well sustained by the cases cited in the second division of his brief.

*Exceptions sustained.*

## CLUB COURTS.

SUPERIOR COURT OF THE POW-WOW.

Defendant's grantor covenanted for himself, his assigns, etc., that when he or they should use a certain party-wall to be erected partly on plaintiff's land, he or they would pay to plaintiff's grantor, his assigns, etc., one half the cost of said wall. In order that the plaintiff may succeed in this action it must appear that the right to sue has passed to the plaintiff, and that the liability to be sued has passed to the defendant.

This is clearly not a covenant running with the land in equity, for such covenants are agreements not to do something; the proper remedy for the breach of which is an injunction. Is this, then, such a covenant as would run with the land at law? Where the relation of landlord and tenant exists, the liability of the parties is regulated by statute, and both the benefit and the burden of such covenants run with the land (32 Henry VIII. c. 34). This relation did not exist here, and it is tolerably well settled in England that in such a case the burden of the covenant does not run (Smith's Lead. Cas. 8th Eng. ed. 103).

Under some circumstances, however, the benefit of the covenant may run if the parties intend that it shall. If it relates to a thing not *in esse*, the word "assigns" must be expressly mentioned; furthermore, the covenant must "touch the use or enjoyment of the land;" *i.e.*, it must be of use to the covenantee as owner of the land with which it runs.

Now, this is a covenant to pay money to the first builder, his assigns, etc. It cannot be said to benefit him as owner of any lot of land. It must be distinguished from a covenant to dig a ditch, for example, upon a lot of land the performance of which would benefit the covenantee or his assignee only if he were the owner of the lot.

Upon the English view, therefore, neither the benefit nor the burden of this covenant runs.

The American cases generally make the question turn on whether there is privity of estate between covenantor and covenantee. As the term "privity" is loosely used, it has led to great confusion. The most satisfactory result is reached by the New York courts, which define privity as meaning the relation of landlord and tenant. *Coles* v. *Hughes*, 54 N.Y. 444; see also 90 N.Y. 663.

In Massachusetts another view of privity obtains. "The same privity that exists between lessor and lessee exists between grantor and grantee where grant is made of any subordinate interest in land." *Morse* v. *Aldrich*, 19 Pick. 449. In this view there is privity where an easement has been created, and a recovery would be allowed in the present case. *Savage* v. *Mason*, 3 Cush. 500.

The Court is of opinion that the defendant is not liable, on the grounds that there is no tenure, and that the covenant cannot be said to be beneficial to the plaintiff as holder of the land.